Case 25-CA-082690

# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

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NICHOLS ALUMINUM, LLC

And

TEAMSTERS LOCAL UNION NO. 371

Ahavaha Pyrtel, Esq., for the General Counsel.

Michael A. Snapper and Keith J. Brodie, Esqs.

(Barnes & Thornburg LLP), for the Respondent.

#### **DECISION**

#### STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Peoria, Illinois on January 24, 2013. Teamsters Local Union No. 371 (the Union) filed the charge on June 8, 2012 and the General Counsel issued the complaint on October 25, 2012. The complaint alleges that Nicholas Aluminum, LLC (the Company) violated Section 8(a)(3) of the National Labor Relations Act (the Act) by discharging Bruce Bandy on April 27 because he engaged in concerted activity in support of Teamsters Local Union No. 371 (the Union). The Company denies the allegations and asserts that Bruce Bandy was discharged because he threatened another employee with serious physical injury in violation of Company rules.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

<sup>&</sup>lt;sup>1</sup> Unless otherwise stated, all dates refer to 2012.

#### FINDINGS OF FACT

#### I. JURISDICTION

The Company, a limited liability company, has been engaged in the manufacture and sale of aluminum at its facilities in Davenport, Iowa, where it annually sells and ships goods valued in excess of \$50,000 directly to points outside the State of Iowa. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

## A. The Company's Operations

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The company has two plants - the casting plant (NAC) and the finishing plant (NAD). Between the two facilities, the Company processes convert scrap metal into aluminum sheets for use by the building industry. The plant manager at NAC at the relevant times was Bill Herbert. The plant manager at NAD at the relevant times was Celal Tekell.

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There are approximately 165 employees in the casting plant working in about 24 different job classifications and nine departments: Receiving, Shredding, Blending, Melding, Hot Mill, Caster, Maintenance, Shipping and Rotary Barrel Furnace.

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Bruce Bandy was employed by the Company since February 2, 1978 and was a longtime member of the Union. For the past 15 to 20 years, he has worked as a blending operator. His duties include adjusting the chemistry and maintaining control of the alloys in the melders and holders. Bandy worked a 12-hour shift. His immediate supervisor was blending supervisor Vick Hansen, who reported to (now former) plant manager Hebert.

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## B. Organizing Campaign

The Union represented the bargaining unit employees at the Company's Davenport facilities at all relevant times. The collective bargaining agreement (CBA) between the parties expired in November of 2011. During the negotiation of a successor agreement between the Company and the Union, the latter initiated a strike at the Davenport facilities which lasted from about January 20 through April 6. Bandy was one of the employees who participated in the strike <sup>2</sup>

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While the strike was in effect, the Company hired replacement workers to perform the work, approximately 100 of whom it eventually hired on a permanent basis on April 4. The Union ended the strike on April 6 and the Company called the striking employees, including Bandy, back to work.

<sup>&</sup>lt;sup>2</sup> Aside from the fact that Bandy went on strike, there was no evidence that he was engaged in any unusual, strategic or significant role during the walkout period. (Tr. 26, 35.)

As striking workers returned to work, the Company held orientation meetings at both NAC and NAD. Participants in these meetings on behalf of the Company included Resources Manager Kristy Riley, (now former) Vice President of Human Resources Mike Albee, and Hebert. During the meetings, the Company told the employees that they could not return to work unless they promised to not strike again. Bandy was one of the employees who signed such a pledge.<sup>3</sup> Thereafter, the Union intervened and prevented the Company from getting additional written pledges, but the Company received verbal assurances from the employees that they would not engage in a strike again. Employees were also reminded of the Company's notolerance policy on harassment, intimidation and physical threats.<sup>4</sup>

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# C. "No Tolerance Policy" and Its Past Enforcement

## 1. Content of the Policy

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The Company has policies against violence and harassment in the workplace.<sup>5</sup> The agreement between the Company and the Union provides that the commission of certain violations by employees—listed under "Group 1" violations—may lead to discharge without a notice. One of these violations is "Assault on any employee: Violation of the Company's policy on Workplace Violence and Threats."

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## 2. Incident Involving Craig Saltzburger

On or around May 4, Robert Schalk, a returning Company employee who participated in the 2012 strike, was waiting in line to punch out and speaking with fellow employee Darren Schnowski. At this time, replacement worker Craig Saltzburger, without any apparent provocation began screaming at Schalk, "What the fuck are you looking at? You got a fucking problem?" while grabbing himself on the crotch. Schalk ignored Saltzburger and walked out, but Saltzburger followed Schalk outside, stepping in front him and asking Schalk if he thought

<sup>&</sup>lt;sup>3</sup> GC Exh. 3.

<sup>&</sup>lt;sup>4</sup> Although the assurances were not given in written, the Union does not contest the applicability of the Company's policy as contained in the expired CBA. (Tr. 82-84, 100-102; R. Exh. 3.)

<sup>&</sup>lt;sup>5</sup> The Company offered substantive details as to its policy regarding violence in the workplace. One of the slides shown during the post-strike orientation meetings in 2012 related to "safety" and provided assurances that it was continually taking steps to reduce the negative effects of "injuries." (R. Exh. 3.) The slide generally states that employees "follow all safety requirements," although no information was offered as to the substantive content of those requirements, and the words "violence" or "threats" were not mentioned. Another slide titled "Company Violence in the Workplace Statement" informed employees that "[h]arassing disruptive, threatening, and/or violent situations or behavior by anyone, regardless of status, will not be tolerated and subject to discharge for the first offense." (R. Exh. 3.) A notice stating the same was placed on the Company's bulletin sometime after the strike. (R. Exh. 4.; TR. 172-173.) Another document defined "Prohibited Conduct" to include, among other things, "[p]ossession of firearm, knife with a blade greater than three inches or any weapon while on Company property or while on company business" and "[a]ggressive or hostile behavior that creates a reasonable fear of injury to another person..."

<sup>&</sup>lt;sup>6</sup> R. Exh. 5.

Saltzburger was "pretty" and what his "fucking problem" was. Schalk asked Saltzburger to get away from him and attempted to get to his car, but Saltzburger stepped in front of Schalk again and asked, "You got a fucking problem? What are you looking at?" At this point, Schalk told Saltzburger that they should go upstairs and report the confrontation. Saltzburger seemed to agree: "That would be fucking fine, let's fucking do it."

As they returned to the facility, Schalk saw supervisor Phil McBroom and called him over. Schalk described what happened, while Saltzburger continued hurling invectives: "You got a fucking problem? What are you looking at?" In response to Schalk's report, McBroom asked Schalk, "What the fuck do you want me to do about it?" Schalk told him that he thought he was supposed to report such apparent violations of the no-tolerance policy. McBroom told Schalk that he "should fucking grow up" and that if Schalk wanted him to do anything, he would fire both employees. Schalk left.

Later, Shalk called and left a message for Riley, the Human Resources manager. In the message, Schalk detailed Saltzburger's harassing behavior and McBroom's inaction. The call was not returned and, later that afternoon, Schalk called Hebert and left a message. Hebert returned the call a short while later, promised that the Company would look into it and launch an investigation. A few days later, Schalk met with Riley and Mike Belk, a Union steward. At the end of the meeting, Riley told Schalk that when there is more than one employee involved, you never get the full story." She did, however, promise Schalk that she would look into the matter. Schalk never heard back.

In August, Schalk e-mailed plant manager Brian Wolfe asserting that, by threatening to discharge Schalk for reporting the Saltzburger incident, McBroom engaged in threatening, harassing and intimidating behavior in violation of the Company's zero tolerance policy. Schalk previously expressed this concern to Wolfe. Wolfe took no action.<sup>8</sup>

# 3. Incident Involving John Dinkman and Sam Harroun

Christopher James was a caster assistant at NAC since August 2007 who participated in the 2012 strike as a picket line patrol. On October 12, within a week of returning, he attended a staff meeting. Others present included supervisor Everett Orey, melding operator Sam Harroun, and caster assistants John Dinkman and Aaron Ellenberg. Harroun, Dinkman and Ellenberg were all replacement workers. During the meeting, Harroun said to Dinkman that it was the caster assistants' fault that the "holder" was too hot. Dinkman disagreed and said he never told the caster assistants to watch the temperature. Orey told the employees to stop blaming each other. Harroun then turned to Dinkman and said, "I'm going to take you out back and beat your ass." After exchanging additional comments, Orey concluded by saying, "Hey, that's enough." No disciplinary action was taken in response to Harroun's comment.

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<sup>&</sup>lt;sup>7</sup> These findings are based on Schalk's credible and unrefuted testimony. (Tr. 84-88.)

<sup>&</sup>lt;sup>8</sup> GC Exh. 14.

<sup>&</sup>lt;sup>9</sup> These findings are based on James' credible testimony. (Tr. 103-110.)

## 4. Incident Involving Mike McGlothen

On December 20, 2011, electrician Mike Cook reported seeing NAD mechanic Mike McGlothen cleaning and loading a pistol in an office at NAD. This made Cook uncomfortable, prompting him to report the incident to Mike Albee. After investigation of the incident, McGlothen was terminated on January 13 for violating the Company's rule: "Assault on any employee. Violation of the Company's policy on Workplace Violence and Threats." However, the Company rehired him during the strike the following month. 10

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### 5. Incident Involving Roosevelt Smith

During the summer 2012, former employee Roosevelt Smith told his supervisor, Jim Hays, that he had weapons in his car and was going to shoot him "in the gut," causing Hays to "shit in a bag for the rest of his life." The Company suspended Smith for two weeks before discharging him.<sup>11</sup>

## 6. Incident Involving Ed Fountain

One to two years prior to the 2012 strike, Ed Fountain, a maintenance employee, called Riley and threatened to go to her office and beat her with a baseball bat. He was fired sometime after this incident.<sup>12</sup>

## D. Events of April 25, 2013

Keith Braafhart has been employed by the Company since 1995. He primarily worked at NAD, but also worked at NAC as needed. During the 2012 strike, Braafhart was one of the employees who crossed the picket line. Since that time, he has worked as a melding utility employee at NAC.

On April 25, Braafhart was operating a forklift truck and moving toward Melder 3. As he approached one of the intersections, Bandy walked out of the melding backroom, coming to the right side of Braafhart. Braafhart honked a few times and slowed down. At that time, Bandy looked toward Braafhart and gradually swung his right hand diagonally across his neck with the thumb pointing up. Braafhart construed Bandy's gesture as a threat.<sup>13</sup> Braafhart saw Sam

<sup>&</sup>lt;sup>10</sup> Aside from Cook's reaction, there is no evidence that McGlothen was attempting to harass, intimidate or injure anyone. (GC Exh. 4; Tr. 30, 186-187.)

<sup>&</sup>lt;sup>11</sup> This finding is based on Hebert's credible testimony. (Tr. 162-163.)

<sup>&</sup>lt;sup>12</sup> This finding is based on Riley's credible testimony. (Tr. 158, 164.)

<sup>&</sup>lt;sup>13</sup> I credit Braafhart's testimony that he did not reasonably construe Bandy's gesture as a request to cut off the machine, but rather, as a cut throat gesture. His reenactment revealed a gradual, and not rapid, movement of Bandy's arm, thus ruling out involuntary movement. (Tr. 129, 134-136.) Bandy's explanation and reenactment, on the other hand, were inconsistent and incredible. He described numerous near accidents involving moving equipment and how he tends to respond by lurching backwards and involuntarily moving his right hand in a diagonal motion across his chest. Instead, when confronted about the gesture by Braafhart, he told him was scratching his throat. (Tr. 48-56, 71-74.),

Harroun and asked him if the latter witnessed the incident. Harroun stated that he saw the gesture as a request to Braafhart to stop blowing the horn.<sup>14</sup>

Braafhart parked the truck and went to report the incident to the Human Resources Department. He later met with Albee, Hansen and Herbert as they took notes, and asked Braafhart not to speak with anyone about the incident after leaving. Management also interviewed Harroun later that day. He described Bandy's hand gesture and opined that it resembled a gesture where one person tells another to shut off the vehicle's engine. <sup>15</sup>

Shortly thereafter, Bandy was called to the office and suspended. On April 27, Riley called Bandy to inform him that he was discharged.

#### LEGAL ANALYSIS

The General Counsel contends that the Company violated Section 8(a)(3) by discharging Bruce Bandy on April 27 because he supported the Union by going out on strike the following year. The Company denies the allegations and asserts that Bandy was discharged because he threatened another employee with serious physical injury in violation of its no-tolerance for violence or harassment policy.

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Section 8(a)(3) allegations are analyzed under the *Wright Line* framework, which requires the General Counsel to make a prima facie showing of sufficient proof to support the inference that protected conduct was a motivating factor in the employer's decision. 251 NLRB 1083, 1089 (1980). To meet this burden, the General Counsel must establish that the employee engaged in protected activity, had knowledge of the protected activity took adverse action against the employee as a result of this protected activity. *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). Once the General Counsel has proven these elements, the burden shifts to the employer to demonstrate that he would have taken the same action even in the absence of protected conduct. *Manno Electric*, 321 NLRB 278, 281 (1996). If the evidence establishes that the reasons given for the discharge are pretextual, either in that they are false or not relied on, the employer has failed to show that it would have taken the same action absent the protected conduct, and there is no need to perform the second part of the *Wright Line* analysis. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

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It is undisputed that the Company knew that Bandy, a bargaining unit member, engaged in protected concerted activity by participating in a Union-sponsored strike in 2012. I also found that, after returning to work, he made a threatening gesture to an employee who did not go out on strike. Whether Bandy's discharge after returning from the strike was due to his protected activity, however, is heavily disputed. The General Counsel contends that his strike participation alone provides sufficient circumstantial proof upon which to predicate animus, while the Company argues that Bandy was one of many who went on strike and returned to work, almost all without incident.

<sup>15</sup> This finding is based on Harroun's credibly testimony. (Tr. 140, 144-146; R. Exh. 2.)

<sup>&</sup>lt;sup>14</sup> Contrary to his comments to Braafhart that Bandy was signaling to stop blaring the horn, Harroun testified that Bandy walked by chuckling and said that his throat itched. (Tr. 139-140; R. Exh. 1.)

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Simply participating in a Union-sponsored strike along with many others and being discharged for misconduct at some point after returning to work is not enough to demonstrate antiunion animus. More evidence is required, whether in the form of independent Section 8(a)(1) violations, hostile remarks or actions by supervisors regarding protected concerted activities, or disparate treatment in the enforcement of an employer's rules. See Airo Die Casting, Inc., 354 NLRB No. 8, slip op. at 40 (2009) (no evidence of antiunion animus simply because employer delayed reinstating two former strikers, where the decision was based on seniority, they were part of a group of 300 strikers, were not particularly active or outspoken union supporters or engaged in any other protected activities that would cause employer to single them out from among the returning strikers for discriminatory treatment); Detroit Newspaper Agency v. NLRB, 435 F.3d 302 (DC Cir. 2006) (discharging former striker for insubordination, without more, did not establish anti-union animus); Florida Steel Corp. v. NLRB, 529 F.2d 1225, 1234 (5th Cir.1976) (union membership cannot protect clear insubordination where employer's discipline was not motivated by anti-union animus). Cf. NLRB v. Transp. Mgmt. Corp., 462 U.S. 393 (employer displayed antiunion animus when it discharged employee who attempted to establish a union for work infractions because the employer had not followed its customary practice of issuing written warnings before discharge); Southwest Merchandising Corp. v. NLRB, 53 F.3d 1334 (DC Cir. 1995) (animus where employer considered striking employees' participation in a strike as a factor in making its decisions to hire after the strike and treated non-striking applicants preferentially); Outboard Marine Corporation-Calhoun, 307 NLRB 1333, 1368-1369 (1992) (employer unlawfully retaliated against strikers by delaying their recall, denying promotional opportunities, misclassifying their positions, subjecting them to more onerous working conditions and applying other disparate treatment).

Here, there is no background of independent Section 8(a)(1) violations during the period after the strike and up to the time of Bandy's discharge. Nor is there any evidence of hostile remarks or actions by the employer since the strike concluded and employees returned to work. We do have an evidentiary sampling, however, of other employee-on-employee confrontations within the Company's workplace revealing instances in which it either did or did not enforce its policy against violence and harassment.

When the charging party attempts to show antiunion animus by alleging that the employer discharged an employee based on an action which the employer treated more leniently in the past, the employer can rebut the claim by presenting evidence that it treated similar behavior in a similar manner. See *NLRB v. Hospital San Pablo, Inc.*, 207 F.3d 67, 73 (1st Cir. 2000) (employer displayed antiunion animus by discharging an employee, who engaged in union activities, based on an infraction that a non-union employee also committed in the past without enduring similar punishment).

The record presents a mixed bag of Company responses to employee-on-employee confrontations within the relatively recent past. The Company previously discharged three employees for violating its no-tolerance policy. Two employees, Fountain and Smith, explicitly threatened to cause serious physical injury to coworkers via shooting with a gun or beating with a baseball bat. Another employee, McGlothen, brought a gun to work and, although there is no evidence that he cleaned and loaded it in an open work setting, was discharged in accordance with the no-tolerance policy. The section cited – assault – was a plausible conclusion based on a fear that the incident created. McGlothen was rehired a month later as the Company brought in

replacement workers during the strike. However, that subsequent development was driven by the Company's desire to hire replacement workers and, without more, does not undermine the legitimacy of the Company's earlier discharge.

On the other hand, the Company took no disciplinary action against two employees who engaged in other conduct tantamount to threats of violence or harassment. In one instance, Harroun told another employee that, essentially, he was going to beat him up. The statement was made in front of a supervisor, who resolved the matter at that time.

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In another instance, Saltzberger, a replacement worker, harassed Shalk, a coworker who had gone out on strike. The circumstances leading up to the confrontation are slim, but something obviously transpired, leading Saltzberger to harass Shalk numerous times on one day. The harassment consisted of an invective-laced inquiry as to what problem Shalk had with him. The two of them then went to a supervisor, where Saltzberger continued his barrage. The supervisor did nothing, except warn Shalk to grow up. Similarly, human resources officials also did nothing after the matter was reported to them.

This situation presents a close call. The record contains two discharges based on threats to cause serious injury or worse, and one discharge, labeled an assault, for cleaning and loading a gun at work. In two instances, the Company did not discipline employees who harassed or threatened coworkers. The harassment situation did not suggest that it would be followed by violence, while the threat as to kicking a coworker's rear end referred, at most, to a physical injury. In Bandy's case, he made a gesture by simulating the cutting of his throat that the Company reasonably construed as a threat of serious physical injury or death.

When considered together, the record evidence indicates a tendency by the Company to enforce the no-tolerance policy against employees who threaten or harass others with serious physical injury or worse, while threats of physical injury and harassment tend to be overlooked. Under the circumstances, these previous instances do not establish by the preponderance of the evidence that the Company engaged in the disparate treatment of Bandy by discharging him for threatening another employee with serious physical injury or worse.

#### CONCLUSIONS OF LAW

- 1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.
  - 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
  - 3. The Company has not violated the Act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>16</sup>

<sup>&</sup>lt;sup>16</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted

# ORDER

5	The Complaint is dismissed in its entirety.		
	Dated, Washington D.C.	April 8, 2013	
10			Michael A. Rosas Administrative Law Judge